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No. 87-1987

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DONALD H. MOORE,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

BRIEF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 6, 1988

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's dismissal of a petition to review an arbitration award where the petitioner failed to allege any of the three extraordinarily narrow grounds for judicial review of such awards provided under Section 3 First (q) of the Railway Labor Act?

PARTIES BELOW

Petitioner Donald H. Moore was the petitioner in the district court and the appellant in the court of appeals. Respondent Consolidated Rail Corporation was the respondent in the district court and the appellee in the court of appeals.

Respondent has no parent corporation(s). It has the following affiliates and non-wholly-owned subsidiaries:

The Akron & Barberton Belt Railway Company

Albany Port Railway Corporation

American Casualty Excess Insurance, Ltd.

The Belt Railway Company of Chicago

Chicago & Western Indiana Railway Company

Indiana Harbor Belt Railroad Company
Calumet Western Railway Company

The Lakefront Dock and Railroad Terminal Company

The Monongahela Railway Company

Nicholas, Fayette & Greenbrier Railroad Company

Peoria & Pekin Union Railway Company

Pittsburgh Chartiers & Youghiogheny Railway Company

Railroad Association Insurance, Ltd.

Trailer Train
Calpro Company
Railbox Company
Trailer Train Finance, N.V.

Transportation Data Xchange, Inc.

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BRIEF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent Consolidated Rail Corporation ("Conrail") respectfully requests that the Court deny the Petition for Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on March 11, 1988.

STATUTE INVOLVED

The Petition involves certain provisions of the Railway Labor Act ("RLA"), 45 U.S.C. §§153 First and 153 Second. The relevant portions of these provisions are set forth in Respondent's Appendix.

COUNTERSTATEMENT OF THE CASE

Petitioner Donald H. Moore ("Moore" or "Petitioner") was employed by Respondent Consolidated Rail Corporation ("Conrail") as a locomotive engineer until September 24, 1985 when he was discharged for using marijuana while on duty. Thereafter, pursuant to the collective bargaining agreement between Conrail and Moore's union, the Brotherhood of Locomotive Engineers ("BLE"), and in accordance with the dispute resolution procedures mandated by the Railway Labor Act, 45 U.S.C. § 153 First, Moore appealed his dismissal to a Special Board of Adjustment which reinstated him with full seniority rights but denied his claim for back pay.

The Adjustment Board's award was premised on its review of evidence presented at Moore's disciplinary hearing regarding urinalysis drug screens given to Moore. The testing was prompted by an anonymous telephone call to Moore's supervisor. The evidence showed that because the results of a first test were subsequently misplaced, Moore was administered a second test that revealed the presence of marijuana metabolites. The Board concluded that Conrail had made a determined effort to provide Moore with adequate procedural protections, but that the evidence was "not as clear as it should be" with respect to the chain of custody of Moore's urine sample. Because Moore had a reasonably good disciplinary record, and because of the shortcomings in the chain of custody, the Board concluded that Moore should be reinstated with seniority unimpaired, but without back pay. (Petitioner's Appendix at 15A).

Moore then instituted an action in the United States District Court for the Middle District of Pennsylvania under the provisions of Section 3 First (q) of the Railway Labor Act, 45 U.S.C. § 153 First (q), seeking to modify that portion of the Board's award which had denied him back pay. Applying the very limited standard of review of

arbitration awards set forth in the Railway Labor Act, the district court dismissed Moore's petition because of his failure to allege any of the recognized statutory grounds for overturning arbitration awards set forth in Section 3 First (q). The district court rejected Moore's contention that the Board had misinterpreted the collective bargaining agreement in denying him back pay. Accordingly, the court found that:

> The Board did not expunge the discipline or find the petitioner not guilty of having used marijuana. A fair reading of its decision indicates that, while it believed that the deficiencies in the record did not justify discharge, the record was sufficient to justify a suspension without pay for having used marijuana. In this light, the Board, as the respondent asserts, merely reduced the discipline, and the failure to award back pay consequently did not ignore the agreement. We can not disturb a decision which draws its essence from the collective bargaining agreement.

(Petitioner's Appendix at 11A).

The district court also rejected Moore's argument that it should apply an "absence of rationality" standard in reviewing the Board's decision. The court held that "[t]he Supreme Court has 'time and again emphasized' that we are limited to the grounds for review provided by the Act." (Petitioner's Appendix at 11A, *citing Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 93 (1978)).

Moore appealed the district court's dismissal to the United States Court of Appeals for the Third Circuit, which affirmed the decision for substantially the same reasons as were set forth in the district court decision. (Petitioner's Appendix at 1A-5A).

SUMMARY OF REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because the legal standards for judicial review of arbitration awards under the Railway Labor Act, which are well established both by the Act itself and the decisions of the Court, were correctly applied by the district court and Third Circuit. Moreover, there are no compelling or important reasons for granting *certiorari*, as this case turns on its own facts and is of importance only to the litigants. The Petition seeks only to have the Court review evidence previously presented to an Adjustment Board under the RLA. Such a request does not warrant the exercise of the Court's discretionary power of review.

REASONS FOR DENYING THE WRIT

A. The Courts Below Properly Applied The Legal Standard For Review Of Arbitration Awards Under The RLA.

Both the Third Circuit and the district court correctly applied well-settled precedent of this Court for reviewing arbitration decisions. Therefore, both courts properly rejected Moore's attempts to attack the underlying award of the Special Board of Adjustment by seeking to expand the scope of review beyond the narrow statutory grounds set forth in Section 3 First. Consequently, the Court need not examine the issues presented by the Petition, as they are well settled by the statute and decisions of the Court.

The Railway Labor Act, 45 U.S.C. §§ 151-188, establishes a comprehensive scheme for federally created rights and responsibilities concerning labor relations within the railroad industry. Among these is the right of an employee or groups of employees to bring

disputes or grievances (called "minor disputes") to binding arbitration. 45 U.S.C. §153 First (i).[1] The Railway Labor Act established the National Railroad Adjustment Board ("NRAB") composed of members appointed by carriers and labor organizations, functioning through divisions, to decide grievances. A neutral arbitrator is appointed to a panel to decide disputes where the carrier and labor representatives are deadlocked.

The Railway Labor Act also provides for alternative arbitration tribunals created through collective bargaining agreement. 45 U.S.C. §153 Second. These are called Special Boards of Adjustment. These Boards have the same jurisdiction as the NRAB and their decisions are subject to the same limited judicial review. *United Steelworkers of America, Local 1913 v. Union R.R.*, 648 F.2d 905, 910 (3d Cir. 1981).

The essential element in the statutorily-created grievance arbitration scheme is that "the awards shall be final and binding upon both parties to the dispute." 45 U.S.C. §153 First (m). Thus, the Railway Labor Act provides for limited judicial review by federal courts of awards by the NRAB (or awards of alternative arbitration panels). There are only three limited grounds for review: (a) *failure to comply with the requirements of the Railway Labor Act*; (b) *failure of the Board to conform or confine itself to matters within its jurisdiction*; and (c) *fraud or corruption of a member of the panel making the award*. 45 U.S.C. §153 First (q). [2]

The narrow and limited scope of judicial review of Board awards under the Railway Labor Act has been

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1. Prior to binding arbitration, employee grievances proceed through an elaborate internal grievance procedure involving numerous steps for appeals. 45 U.S.C. §153 First. The full text of this section is provided in the Respondent's Appendix.

2. 45 U.S.C. § 153 First (q), provides a detailed procedure for challenging awards of arbitration panels under the RLA. The full text of this section is provided in Respondent's Appendix.

confirmed in numerous court decisions. The Court has reiterated that courts may review awards only where there exists one of the three narrow grounds for judicial review:

> Judicial review of Adjustment Board orders is limited to three specific grounds: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption. 45 U.S.C. §153 First (q). *Only upon one or more of these bases may a court set aside an order of the Adjustment Board.* See *Andrews v. Louisville & Nashville R. Co.*, 406 U.S., at 325; *Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U.S. 33, 38 (1963).

Union Pacific R.R. v. Sheehan, 439 U.S. 89, 93 (1978) (emphasis added).

The policy behind the limited nature of judicial review, as established in the statute and recognized by the courts, is finality. Section 3 First (m) of the RLA, 45 U.S.C. §153 First (m), states in part, ". . . Awards shall be final and binding upon both parties to the dispute." The Court has made it clear: "This Court time and again has emphasized and reemphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board." *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257, 263 (1965).

The policy favoring finality in railway labor arbitration awards is just as essential to the statutory scheme today as when it was enacted. The Court has summarized the rationale for statutory finality of these arbitration awards:

> In enacting this legislation, Congress endeavored to promote stability in labor-management relations in

> this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts. The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations. Normally finality will work to the benefit of the worker: He will receive a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad. Here, the principle of finality happens to cut the other way. But evenhanded application of this principle is surely what the Act requires.

Union Pacific R.R. v. Sheehan, 439 U.S. 89, 94 (1978) (citations omitted).

Recently, this Court had occasion to reaffirm the principle of finality in labor arbitration awards, albeit in the context of a non-Railway Labor Act award. In *United Paperworkers Int'l Union v. Misco*, __ U.S. __, 108 S. Ct. 364 (1987), the Court held that a federal court may not set aside, on alleged public policy grounds, a labor arbitration award ordering reinstatement of an employee discharged for possession of drugs. This Court concluded that an arbitrator's allegedly grievous error in failing to find sufficient evidence of marijuana possession did not amount to a showing that the arbitrator violated public policy in reinstating the employee. The Court held, in part:

> Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts . . . [W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined.

United Paperworkers In'tl Union v. Misco, supra, __ U.S. __, 108 S.Ct. at 370-71. Clearly, under these standards, further review of the Adjustment Board's decision is not merited.

B. No Non-Statutory Grounds Exist For Reviewing The Adjustment Board's Award.

The Court has previously held that there are no additional grounds for judicial review of Adjustment Board awards other than those set forth in Section 3 First (q) of the RLA. In *Union Pacific R.R. v. Sheehan,* 439 U.S. 89 (1978), the Court rejected the argument that there was a fourth ground of judicial review, lack of due process, in addition to the three statutory grounds. The Court reaffirmed that only the three grounds for review set forth in Section 3 First (q) of the Act provide a basis for review of an NRAB award: "Section 153 First (q) unequivocally states that the 'findings and order of the [Adjustment Board] shall be conclusive on the parties and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says." 439 U.S. at 93.

Nevertheless, Moore appears to argue that the right of privacy guaranteed by the Fourth Amendment should somehow be extended to private, non-governmental employer/employee relationships in order to ensure

"uniformity in the application of the rules of evidence between administrative proceedings and state and federal adjudicatory proceedings." (Petition at p.9). Moore also asserts that Adjustment Board awards are subject to review if they are "wholly baseless and completely without reason." (Petition at p.11).

Petitioner's argument that the Court should review the Adjustment Board's award on the basis of some loosely-defined constitutional right to privacy or due process is simply without support. Conrail is not a state actor and its actions in relation to Petitioner or any of its employees are not governed by constitutional strictures. *Morin v. Consolidated Rail Corporation*, 810 F.2d 720 (7th Cir. 1987). *Accord Myron v. Consolidated Rail Corporation*, 752 F.2d 50 (2d Cir. 1985); *Consolidated Rail Corporation v. Metro-North Commuter R.R.*, 638 F. Supp. 350, 354 (Sp.Ct. R.R.R.A. 1986). In *Morin*, the Seventh Circuit considered a similar question: whether an employee who appealed from an Adjustment Board award upholding his dismissal was entitled to the protections of the Fifth Amendment's due process clause due to Conrail's relationship to the federal government. The Seventh Circuit held that Conrail was *not* an entity of the federal government for purposes of the due process clause and thus was not constrained by the Fifth Amendment. The Seventh Circuit further held that the employee's allegations of lack of due process at his arbitration hearing did not warrant setting aside the Adjustment Board's decision in light of the very limited standard of judicial review.

The RLA simply does not contemplate a "wholly baseless" ground for judicial review. Petitioner argues that this standard was established by the Court in *Gunther, supra*, 382 U.S. 257 (1965). However, Petitioner has taken the Court's dicta in *Gunther* well beyond its intended meaning. In *Gunther*, the Court

held that judicial review was limited to the three statutory criteria. As the Court's decision in *Sheehan* confirmed, *Gunther* did not create a fourth ground for review of Adjustment Board awards.

There is also no merit to Petitioner's claim that the Adjustment Board was required to order back pay because it ordered reinstatement. The Board was within its power to order reinstatement, but deny back pay and other benefits. The law is well developed that arbitrators are afforded a wide range of flexibility in fashioning remedies in cases brought before them. Appeal of a disciplinary decision is not an all or nothing proposition. Employees routinely ask for reinstatement with back pay and all other lost benefits. Adjustment Boards routinely order something less where they deem it appropriate to do so. A Board clearly has the power to fashion an appropriate remedy, which may include reinstatement without lost pay or benefits. *Air Line Pilots Association, Int'l v. Eastern Air Lines, Inc.*, 632 F.2d 1321 (5th Cir. 1980). In *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970), the Fifth Circuit recognized the necessity of flexibility in the fashioning of arbitral remedies:

> No less than the private arbitrator, the Adjustment Board must have flexibility to deal with the variety of situations it encounters in arbitrating "minor" disputes. The courts, therefore, must be careful not to restrain the Board in a strait jacket of precedent under the guise of determining whether the Board exceeded its jurisdiction in making a particular award.

Id. at 234.

Numerous decisions under the Railway Labor Act affirm an Adjustment Board's power to order an employee to be reinstated, while at the same time denying back pay. *Zeviar v. Local No. 2747, Airline, Aerospace and Allied Employees*, 733 F.2d 556 (8th Cir. 1984). *See*

also Epple v. Union Pacific R.R.-Eastern Div., 558 F. Supp. 63 (D. Colo. 1983); *Grimes v. Louisville & Nashville R.R.*, 583 F. Supp. 642 (S.D. Ind. 1984), *aff'd*, 767 F.2d 925 (7th Cir. 1985), *cert. denied*, 476 U.S. 1160 (1986). The courts do not have the power to review and change the remedy awarded by an Adjustment Board. *Walsh v. Union Pacific R.R.*, 803 F.2d 412 (8th Cir. 1986), *cert. denied*, __ U.S. __, 107 S. Ct. 3213 (1987).

Petitioner raises neither an important nor novel issue relating to the enforcement of the RLA. Thus, the Court should not grant *certiorari*.

C. This Case Turns On Its Particular Facts And There Are No Important Or Compelling Reasons For Granting Certiorari.

In essence, Petitioner is asking the Court to review the Adjustment Board's factual conclusions and to analyze the propriety of factual determinations specific to this case. Neither the clarification nor articulation of disputed legal principles is presented by the Petition. Numerous courts have held that a court may not reweigh the evidence before the Adjustment Board or test its sufficiency. As stated by the Fifth Circuit in *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970):

> The federal courts do not sit as super arbitration tribunals in suits brought to enforce awards of the Adjustment Board. They may not substitute their judgments for those of the Board divisions. They need not inquire whether substantial evidence supports the Board's awards. Under the Railway Labor Act, as amended in 1966, Pub. L. No. 89-456, 80 Stat. 208, the range of judicial review in enforcement cases is among the narrowest known to the law.

Other courts are in agreement. "Although plaintiff may disagree that the evidence underlying the Board's decision is adequate, the sufficiency of the evidence comprising the foundation of the Board's decision is not reviewable. The Board's determination is conclusive." *Anderson v. National R.R. Passenger Corp.*, 754 F.2d 202, 203-4 (7th Cir. 1984). Even as serious a change in circumstances as a recanting witness does not allow a court to re-weigh the evidence to overturn an Adjustment Board award, as the weighing of the evidence is strictly the province of the Adjustment Board. *Woodrum v. Southern Ry.*, 750 F.2d 876 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985).

Reviewing the quantum and quality of the evidence supporting Moore's dismissal was the responsibility of the Adjustment Board. While Moore argues that the evidence was somehow tainted, this assertion does not provide a basis for granting *certiorari*. As the Court has consistently held, it does not "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The decision is of importance solely to the litigants in this case, and turns on facts unique to this case. There are no special or important reasons favoring an exercise of the Court's discretionary power of review.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that the Petition should be denied.

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July 6, 1988

APPENDIX TO BRIEF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

§153. NATIONAL RAILROAD ADJUSTMENT BOARD

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to particpate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the

selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and in all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division, shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carrriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a

dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a

reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division

making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinios, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall

be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decision shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to

agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request

the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.